

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION**

**UNITED STATES OF AMERICA and
STATE OF MARYLAND,**

Plaintiffs,

v.

Civil Action No. _____

WILLIAM COSTELLO,
JANICE F. COSTELLO,
THE PERMIT COORDINATORS, INC.,)
and SCOTT C. MIELKE,

Defendants.

COMPLAINT

The United States of America, through its undersigned attorneys, by the authority of the Attorney General, and at the request of and on behalf of the Administrator of the United States Environmental Protection Agency and the Assistant Secretary of the Army for Civil Works, and the State of Maryland, by the authority of the Attorney General of Maryland and through its undersigned counsel, and acting at the request of and on behalf of the Maryland Department of the Environment (“MDE”), file this complaint and allege as follows:

NATURE OF THE ACTION

1. This is a civil action commenced under section 309(b) and (d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(b) and (d), and section 9 et seq. of the Rivers and Harbors Act of 1899 ("RHA"), 33 U.S.C. § 401 et seq., to obtain injunctive relief and civil penalties against William Costello, Janice F. Costello, the Permit Coordinators, Inc., and Scott C. Mielke ("Defendants"), for

the discharge of pollutants into waters of the United States in Annapolis, Maryland without authorization by the United States Department of the Army, in violation of CWA section 301(a), 33 U.S.C. § 1311(a), and for constructing a structure that obstructs or alters the navigable capacity of waters of the United States without authorization by the United States Department of the Army, in violation of RHA section 10, 33 U.S.C. § 403.

2. Plaintiff State of Maryland joins this civil action to bring supplemental state claims for injunctive relief against all Defendants, and civil penalties against Defendant William Costello, for the filling of State tidal wetlands without authorization by the Maryland Department of the Environment in violations of section 16-202(a) of the Environment Article of the Annotated Code of Maryland. These claims are so related to the claims listed in the preceding paragraph that they form part of the same case or controversy.

3. In this action, the United States and the State of Maryland seek (1) to enjoin the discharge of pollutants into waters of the United States and State tidal wetlands without a permit in violation of CWA § 301(a), 33 U.S.C. § 1311(a), RHA § 10, 33 U.S.C. § 403 and § 16-202(a) of the Environment Article of the Annotated Code of Maryland; (2) to require Defendants, at their own expense and at the direction of the Environmental Protection Agency, the U.S. Army Corps of Engineers, and the Maryland Department of the Environment to restore and/or mitigate the damages caused by their unlawful activities; and (3) to require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d), and Md. Code Ann. Envir. Art § 16-502(a).

JURISDICTION, VENUE, NOTICE, AND AUTHORITY

4. This Court has subject matter jurisdiction over this action pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b); RHA section 9 et. seq., 33 U.S.C. §§ 401 et seq.; and 28 U.S.C. §§ 1331, 1345, 1355 and 1367.

5. Venue is proper in the District of Maryland, Northern Division pursuant to CWA section 309(b), 33 U.S.C. § 1319(b); RHA section 12, 33 U.S.C. 406; and 28 U.S.C. § 1391(b) and (c), because the Defendants live and conduct business in this District and the cause of action alleged herein arose in this District.

6. Pursuant to CWA section 309(b), 33 U.S.C. § 1319(b), notice of the commencement of this action has been given to the State of Maryland, which joins in this action as a co-plaintiff.

7. Authority to bring this civil action on behalf of the United States is vested in the United States Department of Justice by 28 U.S.C. §§ 516, 519 and Section 506 of the CWA, 33 U.S.C. § 1366, and RHA Section 17, 33 U.S.C. § 413. Authority to bring the supplemental claims identified in this action is vested in the Attorney General of Maryland by § 16-502 of the Environment Article, Annotated Code of Maryland.

DEFENDANTS

8. Defendants William and Janice F. Costello are private individuals, who, at all times relevant to the Complaint, owned or otherwise controlled the real property located at 1423 Sharps Point Road, Annapolis, Maryland 21401 (“the Site”). The Site is bounded on the south side by Whitehall Creek, a tidal, navigable waterway and is the location of the federal and state violations for which the United States and MDE seek injunctive relief.

9. Defendant the Permit Coordinators, Inc., is a Maryland corporation with offices at 260 Moreau Lane, Severna Park, Maryland 21146.

10. Defendant Scott C. Mielke, is a professional engineer who is employed by the Permit Coordinators, Inc.

11. All Defendants are persons within the meaning of Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. All Defendants, at all times relevant to this Complaint, engaged in the discharge of pollutants into the navigable waters of the United States and the obstruction or alteration of the navigable waters of the United States, and engaged in the filling of State tidal wetlands, without proper permits or approvals as specified in this Complaint

FEDERAL STATUTORY BACKGROUND

13. CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants into navigable waters except in compliance with, inter alia, a permit issued pursuant to CWA section 404, 33 U.S.C. § 1344.

14. CWA section 404(a), 33 U.S.C. § 1344(a), authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into navigable waters at specified disposal sites, after notice and opportunity for public comment.

15. CWA section 502(12), 33 U.S.C. § 1362(12), defines "discharge of a pollutant" to include "any addition of any pollutant to navigable waters from any point source."

16. CWA section 502(6), 33 U.S.C. § 1362(6), defines "pollutant" to include, inter alia, dredged spoil, rock, sand and cellar dirt.

17. CWA section 502(7), 33 U.S.C. § 1362(7), defines "navigable waters" as "the waters of the United States, including the territorial seas."

18. 33 C.F.R. § 328.3(a)(1), (2), (5) and (7), and 40 C.F.R. § 232.2, define "waters of the United States" to include: (i) all waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce; (ii) all inter-state waters; (iii) tributaries to such waters; and (iv) wetlands adjacent to such waters or their tributaries.

19. CWA section 502(14), 33 U.S.C. § 1362(14), defines "point source" to include "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged."

20. CWA section 502(5), 33 U.S.C. § 1362(5), defines "person" to include "an individual, corporation, partnership, association"

21. CWA section 309(b), 33 U.S.C. § 1319(b), authorizes the commencement of a civil action for appropriate relief, including a permanent or temporary injunction, against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

22. CWA section 309(d), 33 U.S.C. § 1319(d), authorizes the commencement of an action for civil penalties against any person who violates CWA section 301(a), 33 U.S.C. § 1311(a).

23. RHA section 10, 33 U.S.C. § 403, proscribes the construction of any structure which obstructs or alters the navigable capacity of any navigable water of the United States, unless affirmatively authorized by Congress or a permit issued by the United States Army Corps of Engineers.

24. RHA sections 10, 12, and 17, 33 U.S.C. §§ 403, 406, 407, and 413 authorize the commencement of a civil action for injunctive relief against any person who violates RHA section 10, 33 U.S.C. § 403.

MARYLAND STATUTORY BACKGROUND

25. Section 9-253 of the Environment Article, Annotated Code of Maryland, confers upon the Secretary of the MDE all powers that are necessary to comply with and represent the State of Maryland (referred to throughout the Environment Article as “the State”) under the federal CWA. Section 16-202(a) of the Environment Article prohibits the dredging or filling of State wetlands without a license.

26. “State wetlands” is defined in Section 16-101(n) of the Environment Article as “any land under the navigable waters of the State below the mean high tide, affected by the regular rise and fall of the tide.”

27. “Tidal wetlands” is defined in Code of Maryland Regulations (“COMAR”) 26.24.01.02(57) as “all State and private tidal wetlands, marshes, submerged aquatic vegetation, lands and open water affected by the daily and periodic rise and fall of the tide within the Chesapeake Bay and its tributaries, the coastal bays and adjacent to Maryland’s coastal barrier islands, and the Atlantic Ocean to a distance of three miles offshore of the low water mark.”

28. “License” is defined in COMAR 26.24.01.02(27) as “written authorization by the Maryland Board of Public Works under Environment Article § 16-202, to create, fill, construct structures, or conduct certain other activities involving State tidal wetlands which conveys a limited property interest.”

29. “Filling” is defined in Section 16-101(f) of the Environment Article as “the (a) displacement of tidal water by the depositing into State or private wetlands of soil, sand, gravel, shells, or other materials; or (b) artificial alteration of tidal water levels by any physical structure, drainage ditch, or otherwise.” Filling includes storm drainage projects which flow directly into tidal

waters of the State.

30. “Mean high water line” is defined in COMAR 26.24.01.02(32) as “the line where the land meets the water surface at the elevation of mean high water.”

31. Section 16-502(a)(1) of the Environment Article provides that any person who violates any provision of Title 16 of the Environment Article, or any regulation, permit, license or order issued under Title 16 is liable for a civil penalty not exceeding \$10,000. Section 16-502(b) authorizes the Department to seek injunctive relief to require a person to cease the violations and restore the area unlawfully dredged or filled.

GENERAL ALLEGATIONS

32. On October 27, 1982, the Maryland Board of Public Works issued Wetlands License # 83-181 to the prior owner of the Site. The license authorized an erosion control project consisting of the construction of 197 linear feet of stone revetment extending a maximum of ten feet channelward of the mean high water line, and the backfilling of approximately 480 cubic yards of landsource borrow.

33. On or about November 2, 1982, the Secretary of the Army issued permit number 82-83-0085, reauthorized under permit number 85-0296, to the prior owner of the Site for the placement of approximately 1000 tons of rip rap along 197 feet of shoreline, none of the work to extend more than ten feet channelward of the mean high water line. The permits expired on December 1, 1983 and December 31, 1986, respectively.

34. On or about September 19, 2003, the storm surge created by Hurricane Isabel overtopped the revetment authorized by the license and permits referenced in paragraphs 32-33, and eroded the bank behind it, causing the revetment to collapse.

35. On September 20, 2003, the State of Maryland issued an Expedited Tidal Wetlands License to Repair or Replace Structures Damaged by Hurricane Isabel authorizing the replacement and repair of functional structures and revetments destroyed by the hurricane (the "Maryland Isabel Permit"). The Maryland Isabel Permit generally authorized repairs and replacements on the condition that "the configuration of the structures as of September 17, 2003, is maintained and the dimensions of the structures to be repaired or replaced do not exceed the dimensions of the damaged structures."

36. On September 22, 2003, the United States Army issued a Public Notice informing the public that the repair, rehabilitation or replacement of a previously authorized, currently serviceable structure or fill was authorized for purposes of CWA section 404 pursuant to Nationwide Permit 3, provided that repair, rehabilitation or replacement was completed by September 30, 2005 (the "Corps Isabel Notice").

37. On or about September 22, 2003, Defendants The Permit Coordinators, Inc. and Scott C. Mielke entered into an agreement with Defendant William Costello to prepare permit application materials, and to design, direct and/or control the construction of a revetment at the Site.

38. On or about September 24, 2003, Defendants the Permit Coordinators, Inc. and Scott C. Mielke prepared permit application materials for Defendants William and Janice F. Costello, including engineer's drawings/designs.

39. On or about September 26, 2003, Defendant William Costello, with the assistance of Defendants the Permit Coordinators, Inc., and Scott C. Mielke, applied to the Anne Arundel County Department of Permits and Inspections (the "County") for a permit to reconstruct a 200 linear foot stone revetment and repair the bank that lay behind it. Attached to the permit application was an

affidavit signed by Defendant William Costello certifying that the proposed work was an exact replacement in the exact location of what existed prior to the hurricane. Additionally, Scott C. Mielke signed a permit application stating that the proposed work was to “[re]construct 200 LF stone revetment and repair eroded hillside. Replacement due to Isabel.”

40. On September 26, 2003, the County issued Building Permit # BO2196502 to Defendant William Costello authorizing the “in kind” replacement of a 200 linear foot stone revetment and repair of an eroded hillside.

41. From December 2003 through approximately March 2004, the Defendants and/or persons acting on their behalf or pursuant to their direction built a revetment at the Site that extends up to approximately 53 feet channelward of the mean high water line across the 200-foot shoreline of the Site. This revetment deviated significantly from the conditions authorized by the permits referenced in paragraphs 33, 35, and 36, and did not constitute the repair, rehabilitation or replacement of a previously authorized, currently serviceable structure or fill.

42. From December 2003 through approximately March 2004, the Defendants, and/or persons acting on their behalf or pursuant to their direction, discharged dredged or fill material into waters of the United States without a permit under CWA section 404 at the Site. Through these same activities, the Defendants and/or persons acting on their behalf or pursuant to their direction filled tidal Wetlands of the State of Maryland in violation Title 16 of the Environmental Article of the Annotated Code of Maryland.

43. The dredged or fill material that Defendants and/or persons acting on their behalf or pursuant to their direction caused to be discharged includes, among other things, dirt, spoil, rock and

sand, all of which constitute "pollutants" as defined in CWA section 502(6), 33 U.S.C. § 1362(6), and "fill" as defined by Section 16-101 of the Environment Article, Annotated Code of Maryland.

44. Defendants and/or persons acting on their behalf or pursuant to their direction used earth-moving equipment to accomplish the discharges. This equipment constitutes "point sources" as defined in CWA section 502(14), 33 U.S.C. § 1362(14).

45. The dredged or fill material that Defendants and/or persons acting on their behalf or pursuant to their direction, caused to be discharged is an unauthorized obstruction or structure that obstructs the navigable capacity of waters of the United States as defined and prohibited by RHA section 10, 33 U.S.C. § 403.

46. Defendants have no permit under RHA section 10, 33 U.S.C. § 403 or any applicable regulations for the erection of maintenance of the unauthorized structure.

47. Defendants have no permit from the Secretary of the Army, acting through the Chief of Engineers, for the discharges of dredged or fill material into waters of the United States as required by CWA sections 301(a) and 404, 33 U.S.C. §§ 1311(a), 1344 or for obstruction or alternation of a navigable water of the United States as required by section 10 of the RHA, 33 U.S.C. § 403. Defendants did not obtain a license for the filling of State wetlands as required by § 16-202 (a) of the Environment Article, Annotated Code of Maryland.

48. The dredged or fill material that Defendants and/or persons acting on their behalf or pursuant to their direction caused to be discharged exceeded any amounts authorized by the Corps Isabel Notice and the Maryland Isabel Permit.

49. Defendants William Costello and Janice F. Costello owned or otherwise controlled the land from which each unauthorized discharge of dredged or fill material into waters of the United States occurred.

50. Defendants William and Janice F. Costello conducted, contracted for, controlled, directed, and/or otherwise caused the unauthorized activities described in Paragraphs 31-34.

51. Defendants the Permit Coordinators and Scott C. Mielke served as consultants to Defendants William and Janice F. Costello, sought permits on their behalf and designed, directed, controlled and otherwise supervised the placement of dredged and/or fill material into waters of the United States and tidal wetlands of the State of Maryland.

52. All Defendants' activities at the Site resulted in the unauthorized filling of approximately 10,600 square feet of waters of the United States and of State tidal wetlands.

FIRST CLAIM FOR RELIEF
(Clean Water Act)

53. Paragraphs 1 through 52 are incorporated herein by reference.

54. From September 2003 through March 2004, Defendants and/or persons acting on their behalf or pursuant to their direction, discharged dredged or fill material to Whitehall Creek at Whitehall Bay at 1423 Sharps Point Road in Annapolis, Maryland.

55. The Whitehall Creek at Whitehall Bay is tributary to and part of the open waters of the Chesapeake Bay and is a "water of the United States" within the meaning of the CWA and the regulations promulgated thereunder.

56. All Defendants have violated and continue to violate CWA section 301(a), 33 U.S.C. § 1311(a), by their unauthorized discharges of dredged or fill material into waters of the United States.

57. Each day that such material remains in place constitutes a separate violation of CWA section 301(a), 33 U.S.C. § 1311(a).

58. Unless enjoined, all Defendants are likely to continue to discharge dredged or fill material into and/or to allow dredged or fill material to remain at the Site in violation of CWA section 301, 33 U.S.C. § 1311.

SECOND CLAIM FOR RELIEF
(River and Harbors Act)

59. Paragraphs 1 through 58 are incorporated herein by reference.

60. From September 2003 through March 2004, the Defendants and/or persons acting on their behalf or pursuant to their direction, discharged dredged or fill material to Whitehall Creek at Whitehall Bay at 1423 Sharps Point Road in Annapolis, Maryland.

61. The Whitehall Creek at Whitehall Bay is part of the open waters of the Chesapeake Bay, subject to the ebb and flow of tide, and is a "navigable water of the United States" within the meaning of the RHA and the regulations promulgated thereunder.

62. All Defendants' activities at the Site resulted in the unauthorized filling and construction of a structure that constitutes an obstruction to the navigable capacity of navigable waters of the United States in violation of RHA section 10, 33 U.S. C. § 403.

63. Unless enjoined all Defendants are likely to continue to violate RHA section 10, 33 U.S.C. § 403.

THIRD CLAIM FOR RELIEF
(State of Maryland's Supplemental Claim for Relief for Unpermitted Filling of Tidal Wetlands under Maryland Law)

64. Paragraphs 1 through 63 are incorporated herein by reference.

65. Between September 2003 and March 2004, Defendants William Costello and Janice F. Costello constructed a stone revetment and filled at the Site in excess of what had been authorized by the Isabel Permit. Defendants have not obtained a license from MDE pursuant to Md. Code Ann. Envir. Art. § 16-202(a).

66. By constructing the new stone revetment and by filling, Defendants William Costello and Janice F. Costello filled approximately 10,000 square feet of State tidal wetlands without a license in violation of Md. Code Ann. Envir. Art. § 16-202(a). The filling resulted in the occupation of and damage to tidal wetlands owned by the State.

67. Pursuant to Sections 16-502(a) and (b) of the Environment Article, Plaintiff State of Maryland is entitled to injunctive relief for Defendants' violation of Section 16-202(a) of the Environment Article. In addition, Defendant William Costello is liable for a civil penalty of \$10,000 for the construction of a new revetment and a civil penalty of \$10,000 for the filling of State tidal wetlands behind the revetment in violation of Section 16-202(a) of the Environment Article.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs, the United States of America and the State of Maryland, respectfully request that this Court order the following relief:

(a). That the Defendants be permanently enjoined from discharging or causing the discharge of dredged or fill material or other pollutants into any waters of the United States except in compliance with the CWA and RHA;

(b). That the Defendants be enjoined to undertake measures, at Defendants' own expense and at the direction of the Environmental Protection Agency, the U.S. Army Corps of Engineers, and the Maryland Department of the Environment to effect complete restoration of the Site, including removal of the unauthorized discharge/structure, and off-site mitigation for irreversible environmental damage, as appropriate;

(c). That the Defendants, jointly and severally, be assessed pursuant to CWA section 309(d), 33 U.S.C. § 1319(d), a civil penalty for each day of each violation of CWA section 301(a), 33 U.S.C. § 1311(a), and that Defendant William Costello be assessed civil penalties in the amount of \$20,000, pursuant to § 16-502 (a) of the Environment Article, Annotated Code of Maryland.

(d). That the Defendants be permanently enjoined from placing any unauthorized structures or obstructions or performing any work waterward of the mean high water mark without first having obtained all requisite federal and state permits;

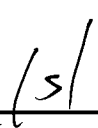
(e). That Plaintiffs be awarded costs and disbursements in this action; and

(f). That this Court grant Plaintiffs such other and further relief as the Court may deem just and proper.

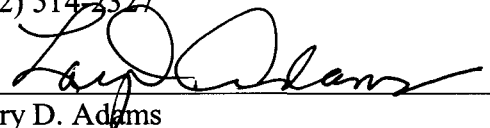
Respectfully submitted,

FOR THE UNITED STATES OF AMERICA

SUE ELLEN WOOLDRIDGE
Assistant Attorney General
Environment and Natural Resources Division




Kent E. Hanson
Michael B. Schon
Environmental Defense Section
United States Department of Justice
P.O. Box 23986
Washington, DC 20026-3986
(202) 514-3327



Larry D. Adams
Assistant United States Attorney
3636 S. Charles Street
Fourth Floor
Baltimore, MD 21201
(410) 209-4800

FOR THE STATE OF MARYLAND

J. JOSEPH CURRAN, JR.
Attorney General of Maryland



Jacqueline Russell
Adam D. Snyder
Assistant Attorneys General
Maryland Department of the Environment
1800 Washington Blvd.
Baltimore, Maryland 21230
(410) 537-3038

OF COUNSEL:

Thomas Charlton
United States Environmental Protection Agency
Office of Compliance and Enforcement Assurance
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Stefania D. Shamet
Senior Assistant Regional Counsel
United States Environmental Protection Agency
Region III
3RC20
1650 Arch Street
Philadelphia, PA 19103

Carl Jeffrey Lorenz
Assistant District Counsel
U.S. Army Corps of Engineers, Baltimore District
Room 6420
10 South Howard Street
Baltimore, MD 21201

Dated: